



STEVEN L. BESHEAR
Governor

FINANCE AND ADMINISTRATION CABINET
DEPARTMENT OF REVENUE
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JONATHAN MILLER
Secretary

THOMAS B. MILLER
Commissioner

In the matter of:

██████████, INC.

Contact: ██████████, Inc.

Attn: ██████████

FINAL RULING NO. 2011-16
March 4, 2011

Sales tax assessments
for the periods
January 1, 2006 through December 31, 2008

FINAL RULING

The Kentucky Department of Revenue has outstanding sales tax assessments totaling \$██████████ against ██████████, Inc. for the audit period January 1, 2006 through December 31, 2008. The following schedule reflects the amount of outstanding tax and applicable interest and penalty accrued to date:

| Period | Tax | Interest as of 3/4/2011 | Penalty | Total |
|-------------------|--------------|----------------------------|--------------|--------------|
| 1/1/06 - 12/31/06 | \$██████████ | \$██████████ | \$██████████ | \$██████████ |
| 1/1/07 - 12/31/07 | \$██████████ | \$██████████ | \$██████████ | \$██████████ |
| 1/1/08 - 12/31/08 | \$██████████ | \$██████████ | \$██████████ | \$██████████ |
| Total | \$██████████ | \$██████████ | \$██████████ | \$██████████ |

██████████, Inc. is an electronic data interchange service business and a computer software retailer.

At issue are unallowable deductions from gross receipts for retail sales. ██████████, Inc. took deductions for sales for which it did not have valid exemption or resale certificates. Also included in the outstanding liability is the assessment on the non-contested items in the amount of \$██████████.

In support of its protest ██████████, Inc. has provided statements from its customer stating that the items were purchased for resale or the use tax has been remitted and/or resale certificates lacking the requisite information for the certificates. In many cases, this information was not timely and lacked detail necessary for the certificates to be considered valid and taken in good faith. Despite DOR's requests by letters dated ██████████, 2010, ██████████, 2010, ██████████, 2010 and ██████████, 2010, ██████████, Inc. has failed to provide the documentation necessary to adjust or reduce the outstanding assessments.

There is a presumption that all sales of tangible personal property sold in this state are subject to the tax unless the retailer accepts a resale or exemption certificate in good faith and maintains the appropriate documentation as outlined in the statutory provisions quoted below:

KRS 139.260 states:

For the purpose of the proper administration of this chapter and to prevent evasion of the duty to collect the taxes imposed by KRS 139.200 and 139.310, it shall be presumed that all gross receipts and all tangible personal property and digital property sold by any person for delivery or access in this state are subject to the tax until the contrary is established. The burden of proving the contrary is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is either:

- (1) Purchased for resale according to the provisions of KRS 139.270;
- (2) Purchased through a properly executed certificate of exemption in accordance with KRS 139.270;
- (3) Purchased according to regulations of the Department of Revenue governing a direct pay authorization; or
- (4) Purchased under a form issued pursuant to KRS 139.777.

KRS 139.270 states in part:

- (1) The resale certificate or certificate of exemption relieves the retailer or seller from the burden of proof only if taken in good faith from a person who, at the time of purchasing the tangible personal property:
 - (a) Indicates an intention to sell it in the regular course of business by executing the resale certificate; or
 - (b) Indicates that the property purchased will be used in an exempt manner by executing a certificate of exemption

* * * * *

(3) (a) "Good faith" shall be demonstrated by the retailer or seller if the retailer or seller:

1. Accepts, within ninety (90) days subsequent to the date of sale, a properly completed resale certificate or certificate of exemption; and
2. Maintains a file of such certificate in accordance with KRS 139.720.

(b) If the retailer or seller has not obtained an exemption certificate or resale certificate or all relevant data elements within ninety (90) days subsequent to the date of sale, in keeping with the good faith standard, the seller or retailer may offer additional documentation to the department that the transaction is not subject to tax after the ninety (90) day period which the department may consider.

It is DOR's position that ██████████, Inc. did not have properly completed exemption or resale certificates on file for the deductions in question as required under KRS 139.270. Consequently, the burden of proof regarding the validity of the exemptions claimed remains with ██████████. The sales in question were not made to customers that are in the business of reselling computer software or related software maintenances agreements. Without additional proof to the contrary, these remaining transactions are taxable in accordance with KRS 139.260.

Regarding the assessment of penalties on the tax liability, the statutory basis for the penalty assessed is found in subsection 2 of KRS 131.180 (Uniform Civil Penalty Act), which states in part:

Any taxpayer who... fails to have timely paid at least seventy-five percent (75%) of the tax determined due by the department shall, unless it is shown to the satisfaction of the department that the failure is due to reasonable cause, pay a penalty equal to two percent (2%) of the tax not withheld, collected, or timely paid for each thirty (30) days or fraction thereof that the withholding, collection, or payment is late. The total penalty levied pursuant to this subsection shall not exceed twenty percent (20%) of the tax not timely withheld, collected, or paid;...

██████████, Inc. did not timely pay at least seventy-five percent (75%) of the tax determined to be due.

Based upon the foregoing, and the information supplied with the protest and supporting statement, the Department has determined that the sales tax assessments totaling \$ ██████████

(plus applicable interest and penalties) are legitimate liabilities of ██████████, Inc. due the Commonwealth of Kentucky.

This letter is the final ruling of the Department of Revenue.

APPEAL

You may appeal this final ruling to the Kentucky Board of Tax Appeals pursuant to the provisions of KRS 131.110, KRS 131.340-131.365, 103 KAR 1:010 and 802 KAR 1:010. If you decide to appeal this final ruling, your petition of appeal must be filed at the principal office of the Kentucky Board of Tax Appeals, 128 Brighton Park Boulevard, Frankfort, Kentucky 40601-3714, within thirty (30) days from the date of this final ruling. The rules of the Kentucky Board of Tax Appeals, which are set forth in 802 KAR 1:010, require that the petition of appeal must:

1. Be filed in quintuplicate;
2. Contain a brief statement of the law and facts in issue;
3. Contain the petitioner's or appellant's position as to the law and facts; and
4. Include a copy of this final ruling with each copy of the petition of appeal.

The petition of appeal must be in writing and signed by the petitioner or appellant. Filings by facsimile or other electronic means shall not be accepted.

Proceedings before the Kentucky Board of Tax Appeals are conducted in accordance with 103 KAR 1:010, 802 KAR 1:010 and KRS 131.340-131.365 and KRS Chapter 13B. Formal hearings are held by the Board concerning the tax appeals before it, with all testimony and proceedings officially reported. Legal representation of parties to appeals before the Board is governed by the following rules set forth in Section 3 of 802 KAR 1:010:

1. An individual may represent himself in any proceedings before the Board where his individual tax liability is at issue or he may obtain an attorney to represent him in those proceedings;
2. An individual who is not an attorney may not represent any other individual or legal entity in any proceedings before the Board;
3. Any party appealing a final ruling to the Board other than an individual, such as a corporation, limited liability company, partnership, joint venture, estate or other legal entity, shall be represented by an attorney in all proceedings before the Board, including the filing of the petition of appeal; and
4. An attorney who is not licensed to practice in Kentucky may practice before the Board only if he complies with Rule 3.030(2) of the Rules of the Kentucky Supreme Court.

██████████, Inc.

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You will be notified by the Clerk of the Board of the date and time set for any hearing.

Sincerely,

FINANCE AND ADMINISTRATION CABINET

A handwritten signature in black ink, reading "E. Jeffrey Mosley". The signature is written in a cursive style with a large, stylized "E" and "M".

E. Jeffrey Mosley

Interim Executive Director

Office of Legal Services for Revenue